## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 89-5862

---

IN RE HOLYWELL CORPORATION, DEBTOR.

---

FRED STANTON SMITH, as TRUSTEE of the
MIAMI CENTER LIQUIDATING TRUST,
*Plaintiff-Appellee,*

*v.*

UNITED STATES OF AMERICA, *et al.*,
*Defendants-Appellants,*

SHUTTS & BOWEN,
*Intervenor,*

BANK OF NEW YORK,
*Defendant-Appellee.*

---

On Appeal from the United States District Court
for the Southern District of Florida

---

[Filed September 18, 1990]

[Judgment Entered September 18, 1990]

---

OPINION

Before: HATCHETT and COX, *Circuit Judges,*
AND HENDERSON, *Senior Circuit Judge*

---

HATCHETT, *Circuit Judge*:

In this bankruptcy case, we affirm the district court's ruling that a liquidating trustee was not required by the provisions of a confirmed amended Plan of Reorganization ("Plan") nor by statutory provisions to file tax returns and pay income taxes on the sale of pre-confirmation and post-confirmation properties.

## FACTS

Miami Center Limited Partnership ("MCLP"), a Florida limited partnership, obtained a construction mortgage from the Bank of New York ("BNY") to develop the "Miami Center," an office building and hotel complex in Miami, Florida. Following default on the mortgage, MCLP, Holywell Corporation, Chopin Associates, Theodore Gould, Miami Center Corporation, and other "insiders" (hereinafter collectively referred to as the "debtors") as defined in 11 U.S.C. § 101(30)(C) (West Supp. 1990) each filed a petition for reorganization under Chapter 11 of the Bankruptcy Reform Act of 1978.[1]

Both BNY and the debtors submitted competing plans of reorganization and accompanying disclosure statements to the bankruptcy court. The Internal Revenue Service ("IRS"), a creditor, received copies of the plans and disclosure statements and also received notice of all scheduled hearings before the bankruptcy court. On October 10, 1985, following overwhelming approval by the creditors, the bankruptcy court confirmed BNY's amended Plan of Reorganization. The district court affirmed the confirmation order. *See Holywell Corporation* v. *Bank*

[1] Theodore B. Gould, a debtor, owned 100 percent of the stock of Holywell Corporation (debtor), and also served as president and director of Holywell. Holywell Corporation owned 100 percent of the stock of Miami Center Corporation ("MCC") (debtor), and Gould served as president and director of MCC. Gould and MCC were the sole general partners of Chopin Associates (debtor) and of Miami Center Limited Partnership (debtor).

*of New York*, 59 B.R. 340 (S.D. Fla. 1986). This court subsequently dismissed, as moot, the debtors' appeal of the confirmation order because the Plan was substantially consummated and no effective relief could be fashioned. *See Miami Center Limited Partnership* v. *Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823, 109 S. Ct. 69, 102 L.Ed.2d 46 (1988).

The Plan required consolidation of the debtors' estates, establishment of a liquidating trust, and appointment of a liquidating trustee.[2] The Plan was funded by all the debtors' assets, as defined in section 541(a) of the Bankruptcy Code, including proceeds from the pre-confirmation sale of certain of Holywell Corporation's properties (hereinafter the "Washington properties") and the anticipated post-confirmation sale of the Miami Center property. The Plan had no express provision requiring the liquidating trustee to either file tax returns or pay income taxes.

The corporate debtors did not file a tax return concerning the sale of pre-confirmation properties until January 4, 1988, although any gain would have been realized during the fiscal year ending July 31, 1985.[3] At that time they requested the liquidating trustee to pay the taxes owed. Neither the corporate debtor nor the liquidating

---

[2] The parties refer to the trustee created pursuant to the Plan as the "liquidating trustee." Article V of the Plan provides that "[a] Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court . . . is designated as Trustee of all property of the estates of the Debtors." The trustee's responsibilities include the identification and payment of all valid claims against the estate with payment of the sum remaining to the debtors. On August 12, 1985, a United States Bankruptcy Court judge appointed Fred Stanton Smith trustee of the estate.

[3] Shortly after the complaint was filed, Holywell Corporation mailed a consolidated federal income tax return for the fiscal year ending July 31, 1985, to the Internal Revenue Service. The return showed a liability for taxes, interest, and penalties totalling $264,309. Holywell simultaneously demanded that the trustee pay that amount.

trustee filed a tax return for the fiscal year ending July 31, 1986, which would have included gains realized from the sale of the Miami Center property.

## PROCEDURAL HISTORY

The liquidating trustee filed an adversary proceeding in the United States Bankruptcy Court in December, 1987, naming the United States, BNY, and the debtors as defendants. The liquidating trustee sought a declaratory judgment concerning the obligation to file income tax returns and pay taxes, if any, in connection with the sale of the Washington properties and the Miami Center. On April 28, 1988, the bankruptcy court entered final judgment declaring that the liquidating trustee was not responsible for filing or paying income taxes.

Following entry of final judgment, both the United States and the debtors filed notices of appeal. After consolidating the appeals, the district court granted the debtors' emergency motion to stay the final judgment of the bankruptcy court. The court also granted the motion of a law firm, Shutts and Bowen, special counsel to the liquidating trustee, to intervene in the consolidated appeal for the purpose of seeking a lift of the stay in order to obtain payment of $917,000 in attorney fees.

BNY moved to dismiss the appeal, as moot, and the liquidating trustee moved for authorization to consummate the settlement with Dade County of *ad valorem* tax claims.

In July, 1989, the district court granted in part, and denied in part, the BNY's motion to dismiss. The court dismissed the appeal to the extent that the debtors sought to challenge the Plan based on allegations that BNY, through its plan of reorganization, attempted to defraud the government of income taxes. The district court denied the motion to the extent that the government and the debtors sought to enforce provisions of the Plan

which they contended provided for the payment of income taxes. Additionally, the district court vacated its earlier stay of the bankruptcy court's final judgment.

## CONTENTIONS

The government and the debtors contend that this court has jurisdiction to decide whether the liquidating trustee is responsible for filing income tax returns and paying income taxes in connection with the sale of the properties. Insofar as the merits of the complaint are concerned, they contend that under certain provisions of the Plan, the liquidating trustee was obligated to file and pay income taxes. Additionally, they contend that certain statutory provisions of the Income Tax Code require that the liquidating trustee file and pay taxes. Moreover, they contend that once that obligation arises, the grantor trust provisions of the Internal Revenue Code do not relieve the liquidating trustee of that duty.

The liquidating trustee contends that this court lacks jurisdiction to hear this appeal because the allegations constitute a substantial modification of the Plan. Addressing the merits, the liquidating trustee contends that the debtors were required to file tax returns and pay taxes, if any, relating to the sale of pre-confirmation and post-confirmation properties.

## ISSUES

We address the following issues: (1) whether this appeal is moot; (2) whether the provisions of the Plan require that the liquidating trustee pay all applicable income taxes on the sale of the pre-confirmation and post-confirmation properties; and (3) whether the income tax laws require that the liquidating trustee pay all applicable income taxes.

## DISCUSSION

### A. *Mootness*

The government and the debtors contend that we have jurisdiction to decide this case despite our earlier decision dismissing their appeal of the district court's confirmation of the Plan. According to the government and the debtors, we have jurisdiction to decide whether the liquidating trustee failed to discharge his duties in accordance with the terms of the Plan. Further, they contend that we have jurisdiction to redress BNY's fraudulent act of submitting a plan of reorganization which failed to disclose the absence of any provision relating to the payment of income taxes.

The mootness doctrine, as applied in a bankruptcy proceeding, permits the courts to dismiss an appeal based on its lack of power to rescind certain transactions. *See Markstein* v. *Massey Associates Ltd.*, 763 F.2d 1325 (11th Cir. 1985); *In re Roberts Farms, Inc.*, 652 F.2d 793 (9th Cir. 1981); *Miami Center Limited Partnership*, 838 F.2d 1547. The mootness standard "is premised upon considerations of finality . . . and the court's inability to rescind . . . and grant relief on appeal." *Miami Center Limited Partnership*, 838 F.2d at 1553 (quoting *In re Sewanee Land Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984)). In dismissing the debtors' previous challenge, this court was guided by "the important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval unless a stay is obtained." *Miami Center Limited Partnership*, 838 F.2d at 1555. Mindful of that policy, we will not entertain any challenge to the Plan which seeks to modify or amend its provisions.

The district court is correct in its ruling that the allegation of fraud is an attempt to modify or alter the Plan and is therefore barred under the mootness doctrine. The allegation seeks to alter the Plan by challenging the terms and provisions which the bankruptcy

court and the district court approved. We also conclude that the allegation concerning the propriety of the bankruptcy court's approval of a plan which makes no express provision for income taxes is an attempt to alter or modify the Plan and is therefore barred. The need for finality requires that we decline to address the merits of these allegations which seek to challenge the court-approved Plan.

We reject the debtors' attempt to create an exception to the mootness doctrine based on the holding of *In re Seminole Park & Fairgrounds, Inc.*, 502 F.2d 1011 (5th Cir. 1974). In *In re Seminole Park*, the court held that the allegation was not "a belated effort to alter or amend the plan." *In re Seminole Park*, 502 F.2d at 1014. In this case, however, we have concluded that the allegations seek to amend or modify the Plan. Thus, we find this case distinguishable from *In re Seminole Park*.

The allegation that certain provisions of the Plan and/or provisions of the Income Tax Code require the liquidating trustee to file and pay income taxes is not an attempt to modify or alter the Plan. The focus of this allegation is that the liquidating trustee failed to act in accordance with the court-approved Plan. Thus, we address the merits of this claim because it seeks to enforce existing provisions of the Plan. *See In re Seminole Park*, 502 F.2d 1011 (bankruptcy court has power to assure that court-approved plan is consummated in fact).

B. *Provisions of the Plan*

The Plan required that the liquidating trustee acquire the trust property and dispose of it in accordance with the terms of the Plan. As stated earlier, the Plan makes no express provision for the payment of federal income taxes. Consequently, we must determine whether any of the provisions of the Plan can reasonably be interpreted as requiring the liquidating trustee to file income tax returns and pay income taxes.

The government argues that Article I of the Plan permits it to recover income taxes as an administration claim. Article I of the Plan provides for the payment of actual and necessary expenses of preserving the bankrupt estate as administration claims. The Plan conditions payment, however, to claims for which a proof of claim has been filed or a liability scheduled by the debtor. Since the IRS never filed a proof of claim for taxes and the debtors never scheduled such taxes as a liability, such a claim cannot qualify as an administration claim.

The government and the debtors also assert that section 503 of the Bankruptcy Code obligates the liquidating trustee to pay income taxes. Title 11 U.S.C. § 503 provides that "an entity may file a request for payment of an administrative expense after notice and hearing." It is generally accepted that taxes incurred by a bankrupt estate fall within the definition of administrative expenses. *See In re Lambdin*, 33 B.R. 11 (Bkrtcy. M.D. Tenn. 1983). Pre-confirmation taxes are thus recoverable under this provision. In order to recover payment for administrative expenses, however, a claim must be filed in a timely fashion. *In re Holywell Corp.*, 68 B.R. 134, 137 (Bkrtcy. S.D. Fla. 1986).

We conclude that the IRS cannot recover under section 503 for income taxes because it failed to file its claim in a timely fashion. The debtors filed for bankruptcy on August 22, 1984. The bankruptcy court established January 15, 1985, as the claim bar date. The IRS, despite having notice of the proceedings, filed no claim. In fact, it was not until the liquidating trustee filed the declaratory judgment action in December, 1987, that the government seriously asserted a claim for income taxes. In an earlier proceeding in this case, the bankruptcy court held that claims filed by the IRS on October 16, 1985, and November 6, 1985, were time-barred. A similar conclusion is clearly appropriate in this case.

Post-confirmation taxes are not recoverable as administrative expenses under 11 U.S.C. § 503. In *United States* v. *Redmond*, 36 B.R. 932, 934 (Bkrtcy. D.C. Kan. 1984) the court was faced with a post-petition claim by the IRS for unpaid employment and unemployment taxes. The court rejected the IRS's claim that such taxes constituted administrative expenses under 11 U.S.C. § 503. The court stated that "upon confirmation of a plan of reorganization, property of the bankruptcy estate vests in the reorganized debtor, a new entity, and administration of the estate ceases. As such, the tax liability of the reorganized debtor was not incurred in administering the bankruptcy estate." *United States* v. *Redmond*, 36 B.R. at 934. As the court noted, post-confirmation tax is normally a liability of the debtor. *See Redmond*, 36 B.R. at 934.

We also reject the assertion that Article V of the Plan obligates the liquidating trustee to pay income taxes on the sale of post-petition properties. Article V, paragraph 6 provides:

> All costs, expenses and obligations incurred by the Trustee in administering the Trust or in any manner connected, incidental or related thereto, shall be a charge against the Trust Property, and the Court, upon being satisfied as to the Correctness of any and all costs, expenses and obligations, shall approve and direct the payment thereof prior to a distribution to the holders of unsecured Allowed claims.

As stated above, administration of the estate ceases upon confirmation of a plan of reorganization. *See Redmond*, 36 B.R. at 934. Thus, taxes which accrue post-confirmation are not incurred in administering the Trust, and are not recoverable under Article V of the Plan.

Our conclusion does not leave the government without the ability to collect taxes on the post-confirmation sale of property. It simply means that the reorganized deb-

tor, not the liquidating trustee is responsible for such taxes.

C. *Statutory Requirements*

The government and the debtors strenuously argue that 26 U.S.C. §§ 6012(b)(3), (4) and 6151 require, as a matter of law, that the liquidating trustee file and pay income taxes. Under those provisions, the "trustee in a case under title 11, or an assignee" and the fiduciary of an individual debtor's estate are responsible for filing of returns and paying of taxes owed by a corporate and individual debtors respectively.[4]

The bankruptcy judge found that these provisions did not apply in this case. The bankruptcy judge concluded that because of the limited and essentially ministerial function assigned to the trustee by the Plan, he was a contract trustee rather than a trustee in a case under Title 11. Additionally the bankruptcy judge concluded that because of the liquidating trustee's non-discretionary duties to identify and pay allowed claims in accordance

---

[4] Title 26 U.S.C. § 6012(b)(3), (4) provides as follows:

(3) In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all of the property or business of a corporation, whether or not each party or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporation are required to make such returns.

(4) . . . Returns of an estate . . . of an individual under chapter . . . 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

Title 26 U.S.C. § 6151 provides, in pertinent part that:

(a) [w]hen a return of tax is referred under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed. . . .

with the terms of the Plan, he was more akin to a disbursement agent than an assignee or fiduciary.

We reject the government's contention that the legislative history of 26 U.S.C. § 6012(b)(3) indicates that it was intended to apply to the trustee in this case. The government suggests that because the liquidating trustee was appointed by a court which acquired jurisdiction by virtue of 11 U.S.C. § 105, we should construe the liquidating trustee's appointment as that of a trustee under Title 11. Alternately, the government argues that the liquidating trustee is either an assignee, receiver, or fiduciary of the debtors and thus governed by the requirements of 26 U.S.C. § 6012.

Based on our review of the statutory provisions, we agree with the district court's conclusion that 26 U.S.C. § 6012 does not apply in this case. By its terms, section 6012 refers only to trustees who are appointed under Chapter 11 of the Bankruptcy Code. If Congress had intended that all trustees be subjected to the provisions of section 6012, it would have so provided. We also conclude that section 6012 was not intended to apply to a broad range of individuals without regard to the functions which they perform.

In deciding whether to extend the provisions of section 6012, we find *In re Allen Wood Steel Co.*, 7 B.R. 697 (Bkrtcy. E.D. Pa. 1980) instructive. In *In re Allen Wood Steel Co.*, the bankruptcy court refused to extend the provisions of section 6012 to a disbursing agent under facts similar to those in this case. We agree with the district court that section 6012 does not apply to the liquidating trustee, and rely on its analysis. First, we conclude that the liquidating trustee is not a trustee under Title 11, but rather a contract trustee performing limited and essentially ministerial duties. Second, we agree that the liquidating trustee's non-discretionary duties of distributing the trust property in accordance

with the Plan makes him similar to a disbursing agent rather than an assignee or fiduciary.

## CONCLUSION

We dismiss, as moot, the allegation that the bankruptcy court lacked authority to confirm the Plan, and the allegation that the Bank of New York acted fraudulently in obtaining approval of the Plan. We accept jurisdiction to decide whether the liquidating trustee breached his duty either under the terms of the Plan or other statutory provisions. We hold, however, that neither the provisions of the Plan nor the statutory provisions obligate the liquidating trustee to file income tax returns or pay taxes. Accordingly, we affirm the district court.

AFFIRMED

Cox, *Circuit Judge*, dissenting:

I believe that under 26 U.S.C. § 6012(b)(3) and (4) and section 6151 the liquidating trustee is obligated both to file income tax returns and to pay taxes on behalf of the corporate debtors and the estate of the individual debtor. Contrary to the court's holding, I believe that section 6012(b)(3) applies to an individual, like the liquidating trustee in this case, who is appointed as a part of a confirmed plan of the reorganization and who possesses title to substantially all the debtors' assets. I further conclude that given the broad powers granted to the liquidating trustee in Article V of the Plan, he qualifies as a "fiduciary" within the meaning of section 6012(b)(4).

The court holds that "section 6012 refers *only* to trustees who are *appointed under Chapter 11* of the Bankruptcy Code" (emphasis added). The court reasons that since the liquidating trustee was appointed to administer the Plan, he is a "contract trustee" as opposed to a trustee appointed under title 11. The plain language of section 6012(b)(3), however, makes its filing requirements applicable to a "trustee *in a case* under title 11 of the United States Code. . . ." (emphasis added). While it is not readily apparent from the face of the opinion, the court seems to have equated the meaning of the phrase "a trustee in a case under title 11" with the Bankruptcy Code's definition of a trustee appointed under 11 U.S.C. § 1104(a) (1979).[1] This interpretation of section 6012(b)(3) is too restrictive and fails to comport with the broad wording of the statute. Section 6012(b)(3) is properly viewed as encompassing trustees of a corporate debtor who, like the liquidating trustee, are appointed to

---

[1] 11 U.S.C. § 1104(a) (1979) in pertinent part reads:

> At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee—

administer a reorganization plan in a bankruptcy case. It is not limited to just those trustees who are appointed under 11 U.S.C. § 1104 or section 702.

The legislative history of section 6012(b)(3) further indicates that Congress intended this section to reach a broad spectrum of persons acting in a fiduciary capacity for a corporation in bankruptcy. Committee reports suggest that the phrase "receiver, trustee in a case under title 11 of the United States Code, or assignee . . ." is to be read as encompassing "receivers or other fiduciaries." H.R. Rep. No. 1337, 83d Cong., 2d Sess. 3, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4017, 4543; and S. Rep. No. 1622, 83d Cong., 2d Sess. 3, *reprinted in* 1954 U.S. Code Cong. & Admin. News 4621, 5211. Thus, section 6012(b)(3) anticipates any situation where substantially all the assets of a corporation are vested in a person acting in a fiduciary capacity for the bankrupt corporation. Accordingly, the liquidating trustee, not the assetless corporate debtors, should be responsible for discharging tax obligations.

The court further holds that the liquidating trustee is more like a "disbursing agent" of the trust rather than a "fiduciary" of the individual debtor. Article V of the Plan vests the liquidating trustee with all right, title, and interest of the debtors in their estate property and empowers the trustee to administer the liquidation of that property pursuant to the Plan. The Plan authorizes the liquidating trustee not only to liquidate the debtors' property but also to manage the property "in all other ways as would be lawful for any person owning the same to deal therewith. . ." Article V, paragraph 3. These broad powers include the power to lease, improve or encumber the property, the authority to sue and be sued, and the power to settle litigation in which the debtors are involved and to waive rights on behalf of the debtors.

The court's attempt to characterize the liquidating trustee as simply a disbursing agent denies the reality of his

rights, duties and obligations under the Plan. A mere label does not magically transform the liquidating trustee into something he is not. In fact, his job description squarely fits within the Internal Revenue Code description of a "fiduciary."[2] Consequently, he is obligated under section 6012(b)(4) to file returns on behalf of the individual debtor.

The court nonetheless analogizes the facts of this case to those in *In re Alan Wood Steel Co.*, 7 B.R. 697 (Bankr. E.D. Pa. 1980), to support its conclusion that the liquidating trustee is a "disbursing agent" instead of an assignee or fiduciary of the debtors. However, *In re Alan Wood* is distinguishable from the present case. *In re Alan Wood* involved a disbursing agent under the former Bankruptcy Act.[3] The disbursing agent in *In re Alan Wood* did not have possession of or hold title to the property of the debtors. Moreover, by statute he was only entitled to "distribute, subject to the control of the court, the consideration . . . deposited by the debtor." 7 B.R. at 701 (quoting 11 U.S.C. §§ 110, 743 and 737 (1976)). In this case, the liquidating trustee has possession of the debtors' property and is authorized to do more than simply distribute funds. Therefore, the liquidating trustee more closely approximates an assignee or fiduciary than a disbursing agent.

Since both section 6012(b)(3) and (4) apply to the liquidating trustee, he is obligated to file tax returns on behalf of the corporate debtors and the estate of the individual debtor. Necessarily, then, he is also responsible for the payment of those taxes under 26 U.S.C. § 6151.

---

[2] A "fiduciary" is defined broadly in § 7701(a)(6) of the Internal Revenue Code as "a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity."

[3] *In re Alan Wood Steel Co.* was decided under the old Bankruptcy Act which provided for the appointment of bankruptcy trustees under § 44(a), receivers under § 332, and disbursing agents under § 337(a). A disbursing agent is a statutorily distinct entity.

The court's decision to the contrary encroaches upon the IRS's ability to collect taxes successfully in situations where a reorganization plan provides for the appointment of a trustee to take possession of substantially all the debtors' assets and to administer the Plan. Although the court encourages us to take consolation in the fact that the government may seek collection of the tax monies from the reorganized debtor, it remains unclear from where that money will come.

## APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

---

Case Nos. 88-0795-CIV-KEHOE
88-1053-CIV-KEHOE

---

IN RE HOLYWELL CORPORATION, *et al.*, DEBTORS.

---

THE UNITED STATES of AMERICA,
*Appellant,*
*v.*

FRED STANTON SMITH, as TRUSTEE of the
MIAMI CENTER LIQUIDATING TRUST,
*Appellee.*

---

HOLYWELL CORPORATION, *et al.*,
*Appellants,*
*v.*

FRED STANTON SMITH, as TRUSTEE of the
MIAMI CENTER LIQUIDATING TRUST,
*Appellee.*

---

On Appeal from the United States Bankruptcy Court for the Southern District of Florida

---

[Filed July 31, 1989]

[Judgment Entered July 31, 1989]

---

MEMORANDUM OPINION

---

KEHOE, *District Judge*:

This is a consolidated appeal from the Bankruptcy Court's entry of Final Judgment and Findings of Fact and Conclusions of Law on April 28, 1988, in the adversary proceeding of *Fred Stanton Smith, as Trustee for the Miami Center Liquidating Trust* v. *The United States of America, et al.*, Adv. No. 87-0627-BKC-SMW-A. The Appellants challenge the Bankruptcy Court's ruling that the Trustee of the Miami Center Liquidating Trust ("the Liquidating Trustee") is not responsible for the filing of federal income tax returns and payment of taxes due on gains, if any, derived from the sale of real property in Miami ("the Miami Center property") and Washington, D.C. ("the Washington properties"). After careful review, and for the reasons explained below, the Court hereby AFFIRMS the ruling of the Bankruptcy Court.

## I. *The Facts*

The present appeal has its genesis in the bankruptcy proceedings initiated in 1984 by the Appellants Holywell Corporation, Chopin Associates, Miami Center Corporation, Miami Center Limited Partnership and Theodore B. Gould ("the Debtors").[1] Following their default on a mortgage issued by the Bank of New York ("the Bank") for development of the Miami Center project, the Debtors filed voluntary petitions pursuant to Chapter 11 of the Bankruptcy Code. Both the Bank and the Debtors submitted competing reorganization plans and accompanying disclosure statements. The Internal Revenue Service ("IRS"), as a scheduled creditor, received copies of the disclosure statement and plans and was notified of all confirmation hearings held before the Bankruptcy Court. The IRS filed no objections to either the disclosure statements or the plans. After overwhelming approval by the

---

[1] For a more detailed recitation of the facts underlying these bankruptcy proceedings, *see Holywell Corp.* v. *Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986).

creditors, the Bank's Amended Plan of Reorganization was confirmed by the Bankruptcy Court on October 10, 1985. The Confirmation Order was affirmed on appeal. *Holywell Corporation* v. *Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986). The Debtors' subsequent appeal to the United States Court of Appeals for the Eleventh Circuit was dismissed as moot, on the grounds the Amended Plan was substantially consummated and no effective relief could be fashioned. *Miami Center Limited Partnership* v. *Bank of New York*, 838 F.2d 1547 (11th Cir. 1988). The Supreme Court of the United States has denied the Debtors' petition for writ of certiorari. *Miami Center Limited Partnership* v. *Bank of New York*, [488 U.S. 823], 109 S. Ct. 69, 102 L.Ed.2d 46 (1988). The IRS did not participate in any of the appeals challenging the Confirmation Order.

The Amended Plan called for consolidation of the Debtors' estates, establishment of a Liquidating Trust on behalf of the Debtors and appointment of a Liquidating Trust. The Amended Plan was funded by all of the Debtors' assets, as defined in Section 541(a) of the Bankruptcy Code, including proceeds from the pre-confirmation sale of the Washington properties and post-confirmation sale of the Miami Center property. Although any gains from the sale of the Washington properties would have been realized during the fiscal year ending July 31, 1985, the corporate Debtors did not file a tax return reporting the sale until January 4, 1988, at which time they requested the Liquidating Trustee to pay the taxes owed. Further, neither the corporate Debtors nor the Liquidating Trustee filed a tax return for the fiscal year ending July 31, 1986, which would have included gains realized from the sale of the Miami Center property.

After being advised by counsel that, in his opinion, the Liquidating Trustee was not subject to taxation on any gains derived from the sale of the properties, the Liquidating Trustee filed an adversary complaint in the United

States Bankruptcy Court seeking a declaratory judgment to that effect. On April 28, 1987, the Bankruptcy Court issued a Final Judgment and Findings of Fact and Conclusions of Law in the Liquidating Trustee's favor. Both the United States of America ("the USA") and the Debtors filed notices of appeal; the appeals were consolidated by this Court. On June 20, 1988, the Court granted the Appellants' Emergency Motion to Stay the Final Judgment of the Bankruptcy Court. The Court also granted the motion of the law firm of Shutts and Bowen, special counsel to the Liquidating Trustee, to intervene in the consolidated appeal for the purpose of seeking a lift of the stay so as to permit the Liquidating Trustee to disburse attorneys' fees and costs owed to the firm in the total amount of $917,000. Further, the Bank has moved to dismiss the appeal as moot, and the Liquidating Trustee has moved for authorization to consummate the settlement with Dade County of *ad valorem* tax claims.

## II. *Mootness*

The Bank has moved to dismiss the instant appeal as moot in light of the dismissal on that ground of the Debtors' appeal from confirmation of the Amended Plan of Reorganization. *Miami Center Limited Partnership* v. *Bank of New York*, 838 F.2d 1547 (11th Cir. 1988). The Appellants here, however, do not primarily challenge the Amended Plan; instead, they seek to enforce its provisions, which they contend include payment of federal income taxes. To that extent, therefore, their appeal does not represent an impermissible attempt to effect "piecemeal dismantling" of the Plan and should not be dismissed as moot. *Fred Stanton Smith, et al.* v. *United States of America*, Adv. No. 87-0627-BKC-SMW-A, Findings of Fact and Conclusions of Law at 11. The motion to dismiss is meritorious, however, as to the Debtors' alternative and contrary argument which indeed does challenge the Amended Plan as amounting to a fraud on the IRS in its *failure* to provide for payment of federal

income taxes.[2] *See also* 11 U.S.C. § 1144. Accordingly, the Bank's motion to dismiss the appeal as moot is GRANTED in part and DENIED in part, as explained above.

## III. *Standard of Review*

It is axiomatic that a Bankruptcy Court's findings of fact must be affirmed unless clearly erroneous. B.R. 8013; *Wilson* v. *Huffman (In re Missionary Baptist Foundation of America)*, 712 F.2d 206, 209 (5th Cir. 1983). Conclusions of law, however, are reviewed on a *de novo* basis. *Machinery Rental, Inc.* v. *Herpel (In re Multiponics)*, 622 F.2d 709, 713 (5th Cir. 1980).

## IV. *The Merits*

The Appellants argue that the Amended Plan of Reorganization obligates the Liquidating Trustee to file tax returns for the fiscal years in which gains, if any, were derived from the sale of the Washington and Miami Center properties, and to pay all taxes owed. While the Amended Plan makes no express provision for payment of such taxes, the Appellants contend that they represent administrative expenses.

The Amended Plan provides for payment of administration claims, consisting of "actual, necessary expenses" of preserving the consolidated bankrupt estate or of operating the Debtors' businesses, and of Court-approved allowances. Amended Plan, Art. I at 3. The Amended Plan defines an "allowed claim" as one for which proof of claim has been filed or a liability scheduled by the Debtors. *Id.* at 4. Since the IRS never filed such a proof of claim for the taxes at issue and the Debtors never scheduled them as a liability, their claims do not appear to represent allowed administrative claims under the

---

[2] Even assuming, *arguendo*, this belated allegation of fraud is not moot, there is no support for it in the record before this Court.

terms of the Amended Plan. Further, even assuming the IRS tax claims represent "actual, necessary expenses" of administration, the Amended Plan does not authorize the filing of such claims against the consolidated estate for an unlimited period of time. Section 503 of the Bankruptcy Code permits the filing of a request for payment of an administrative expense after notice and a hearing. Such expense may include taxes incurred by the bankruptcy estate. *Id. See also In re Lambdin*, 33 B.R. 11 (Bkrtcy. M.D. Tenn. 1983). However, in order to recover payment, a claim for administrative expense, like all other claims, must be filed in a timely fashion. *In re Holywell Corp.*, 68 B.R. 134, 137 (Bkrtcy. S.D. Fla. 1986); *In re Pan Lon International, Inc.*, 61 B.R. 549 (Bkrtcy. S.D.N.Y. 1986); *In re Lake Winnebago Development Co., Inc.*, 55 B.R. 1005 (W.D. Mo. 1985). *See also In re Seminole Backhoe Services, Inc.*, 33 B.R. 914, 917 (Bkrtcy. N.D. Tex. 1983).

The Bank and Liquidating Trustee argue that because the tax claims, for which no proofs of claim have even been filed, are untimely, the Appellants are estopped from asserting them now. *See In re International Horizons, Inc.*, 751 F.2d 1213, 1217 (11th Cir. 1985) (IRS's failure to file timely amended proofs of claim for corporate income taxes barred recovery of same from debtors undergoing bankruptcy reorganization); *In re Hebert*, 61 B.R. 44, 47 (Bkrtcy. E.D. La. 1986) (IRS waived right to challenge its treatment under Chapter 13 reorganization plan where it failed to object or take any affirmative action prior to the plan's confirmation).

The Appellants nevertheless appear to contend either that their claims are not untimely or that no proofs of claim need be filed at all, based on the following two grounds. First, as to the taxes assertedly owed on the Washington properties, the Appellants rely on the Bankruptcy Court's

Order on Emergency Motion to Treat Proceeds of the Sale as Cash Collateral, to Separate and Account for Cash Collateral, entered December 31, 1984, pursuant to which Debtor Holywell Corporation was required to continue to provide administrative support for certain companies involved with the Washington properties until, *inter alia*, "all obligations to the Internal Revenue are determined and paid." *In re Holywell Corp., et al.*, Case Nos. 84-01590-BKC-TCB, et al., Order at 2 (Bkrtcy. S.D. Fla. Dec. 31, 1984). The Appellants argue that this requirement suffices to establish their entitlement to the taxes owed on the sale of the Washington Center properties. The Court rejects this argument. The generalized reference to tax obligations in the Bankruptcy Court's Cash Collateral Order does not amount to the requisite proof of claim contemplated by the Bankruptcy Code and the terms of the Amended Plan itself. *In re International Horizons, supra*; Amended Plan, Art. I.

Second, the Appellants claim that the Liquidating Trustee's duty to file the returns and pay the taxes owed on both the Washington and Miami Center properties arises automatically, as a matter of federal law. They base this contention on the statutory requirements that "a trustee in a case under title 11, or an assignee" and the fiduciary of an individual debtor's estate are responsible for the filing of returns and paying of taxes owed by corporate and individual debtors, respectively. 26 U.S.C. §§ 6012(b)(3), (4), 6151.[3] *See also In the Matter*

---

[3] 26 U.S.C. § 6012(b)(3), (4) provides as follows:

> (3) In a case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not each property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the

*of I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974). However, the Bankruptcy Judge determined—and this Court finds no error in that determination—that the Liquidating Trustee fits neither of those definitions. Because of the limited and essentially ministerial functions assigned to the Liquidating Trustee by the Amended Plan, *see* Amended Plan, Art. V. at 43, the Liquidating Trustee is a contract trustee, rather than a "trustee in a case under title 11;" further, the Liquidating Trustee's non-discretionary duties to identify and pay allowed claims in accordance with the terms of the Amended Plan are more akin to those of a disbursing agent, rather than an assignee or fiduciary. *See In re Alan Wood Steel Co.*, 7 B.R. 697 (Bkrtcy. E.D. Pa. 1980).

In addition, the Bankruptcy Court ruled that the Liquidating Trust is a grantor trust and, for that reason, is not a separate taxable entity under the Internal Revenue Code. Pursuant to the Code's grantor trust provisions, *see* Subpart E of Subchapter J, 26 U.S.C. §§ 71-79, a grantor may be taxed individually as owner of the trust if the trust income is, "or, in the discretion of the grantor or a non-adverse party, or both, may be" applied to discharge a legal obligation of the grantor. 26 U.S.C. § 677(a); Treas. Reg. § 1.677(a)-1(d). As a non-adverse party within the meaning of the Code, *see*

---

same manner and form as corporations are required to make such returns.

(4) . . . Returns of an estate . . . of an individual under chapter . . . 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

26 U.S.C. § 6151 provides, in pertinent part, that

(a) . . . when a return of tax is required under this title or regulations, the person required to make such return shall, without assessment or notice and demand from the Secretary, pay such tax to the internal revenue officer with whom the return is filed . . .

26 U.S.C. § 672(a), (b),[4] the Liquidating Trustee is authorized to use the trust income to discharge the Debtors' legal obligations. As such, the Debtors may be taxed as grantors. In the case of *In re Sonner*, 53 B.R. 859 (Bkrtcy. E.D. Va. 1985), a reorganization plan requiring the Liquidating Trustee to hold and distribute proceeds from the sale of the Debtors' real property established a grantor trust, and on that basis the debtor, as grantor, was liable for payment of federal income taxes owed on the sale. As in the present case, the plan in *Sonner* contained no provision for the payment of taxes. Likewise, in *Stockton* v. *United States*, 335 F. Supp. 984 (C.D. Cal. 1971), a trust established for the purpose of liquidating all debts of the grantor was deemed a grantor trust, with the grantor-owner maintaining responsibility for paying federal income taxes.

Based on the above analysis, the Court finds no error in the Bankruptcy Court's ruling that the Liquidating Trustee is not responsible for filing of federal income tax returns or payment of income tax on the sale of the Washington and Miami Center properties.

---

[4] 26 U.S.C. § 672 defines adverse and nonadverse parties as follows:

> (a) *Adverse party*—For purposes of this subpart, the term "adverse party" means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust. A person having a general power of appointment over the trust property shall be deemed to have a beneficial interest in the trust.
>
> (b) *Non-adverse party*—For purposes of this subpart, the term "nonadverse party" means any person who is not an adverse party.

This Court finds no error in the Bankruptcy Judge's conclusion that the Liquidating Trustee is not an adverse party within the meaning of Section 672(a). *See United States* v. *Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex.), *aff'd*, 761 F.2d 1056, 1060-61 (5th Cir. 1985); Treas. Reg. §§ 1.672(a)-1(a), (a)-1(b).

The recent decision of the Supreme Court of the United States in *California State Board of Equalization* v. *Sierra Summit, Inc.*, [490 U.S. 844], 109 S. Ct. 2228 (1989), does not undermine this conclusion. In that case, the Supreme Court ruled that a state may impose a state sales tax on a liquidation sale held by a trustee in bankruptcy. Even assuming that this holding might be broadly applied to validate the federal government's imposition of federal income taxes, it remains inapplicable to the case at bar, since unlike the situation in *Sierra Summit*, the Liquidating Trustee here is not a "trustee in bankruptcy" subject to the provisions of 26 U.S.C. § 6012.

## V. *Conclusion*

In light of the foregoing, the Court affirms the Bankruptcy Court's conclusion that recognition of the Appellants' tax claims would amount to "an impermissible modification of the confirmed plan," as prohibited by 11 U.S.C. § 1127(b). *Fred Stanton Smith, etc.*, Adv. No. 87-0627-BKC-SMW-A, Findings of Fact and Conclusions of Law at 11. *See also In re Northampton Corp.*, 59 B.R. 963 (E.D. Pa. 1984). Accordingly, it is hereby ORDERED AND ADJUDGED as follows:

1. The Final Judgment and Findings of Fact and Conclusions of Law entered by the Bankruptcy Court on April 28, 1988, are hereby AFFIRMED.

2. The Bank's motion to dismiss the appeal as moot is GRANTED in PART and DENIED in PART, as set forth in Section II *supra*.

3. The stay of the Bankruptcy Court's Final Judgment, entered by this Court on June 20, 1988, is VACATED. Accordingly, the request of Intervenor Shutts & Bowen for an Order to pay in full the costs and fees awarded to Shutts & Bowen by the Bankruptcy Court is now MOOT. Likewise, the motion of the Liquidating

Trustee to lift the stay for the purposes of authorizing consummation of the *ad valorem* tax settlement with Dade County is now MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 31st day of July, 1989.

/s/ James W. Kehoe
JAMES W. KEHOE
United States District Judge

## APPENDIX C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

---

Case Nos. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. No. 87-0627-BKC-SMW-A

---

IN RE: HOLYWELL CORPORATION, *et al.*, DEBTORS.

---

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST,
*Plaintiff*,

*v.*

THE UNITED STATES OF AMERICA, *et al.*,
*Defendants.*

---

Chapter 11 Proceedings

---

[Filed April 28, 1988]

---

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

---

SIDNEY M. WEAVER, *Bankruptcy Judge*:

THIS CAUSE came on before the Court upon the Complaint of the liquidating trustee of the Miami Center Liquidating Trust (the "trust") against the United States of America (the "government"), the Bank of New York (the "bank"), Theodore Gould ("Gould"), Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Holywell Corporation (the "debtors") for a declaration of the responsibility of the trust to file and/or pay federal income taxes to the government upon gain realized from the sale of real estate and the Court having heard the testimony, examined the evidence presented, observed the candor and demeanor of the witnesses, considered the arguments of counsel and being otherwise fully advised in the premises does hereby make the following Findings of Facts and Conclusions of Law:

The facts are not in serious dispute. The debtors filed voluntary chapter 11 petitions on August 22, 1984, and the cases were substantively consolidated for all purposes. Shortly after the commencement of the chapter 11 proceedings, the debtors moved the Court for an order authorizing consummation of a prepetition contract for the sale of real estate in Washington (the "Washington properties"). Pursuant to order of this Court, the sale closed in December, 1984 and January, 1985, with the net proceeds due to Gould, Holywell, and Twin Development Corporation, a wholly owned non-filed subsidiary of Holywell, being placed in controlled accounts. The Court determined the proceeds of the sale were subject to the bank's lien, and entered a cash collateral order.

Thereafter, both the debtors and the bank proposed plans of reorganization which utilized the proceeds from the pre-confirmation sale of the Washington properties and the post-confirmation sale of another parcel of real estate (the "Miami Center") as the sources of funds for payment of creditors. However, neither plan expressly provided for the payment of federal income taxes, if any,

due on gain realized from those sales. The bank's Amended Consolidated Plan of Reorganization (the "plan") was confirmed on August 8, 1985, and became effective on October 10, 1985, after the debtors failed to supersede the order of confirmation. The confirmation order was affirmed by the district court, 59 B.R. 340 (S.D. Fla. 1986), and the 11th Circuit Court of Appeals dismissed an appeal of the order as moot because the plan was substantially consummated. *Miami Center Limited Partnership* v. *Bank of New York*, 838 F.2d 1547 (11th Cir. 1988).

The confirmed plan creates a trust and requires that a liquidating trustee be appointed whose responsibilities include the identification and payment of all valid claims against the estate with the payment of the sum remaining to the debtors. The trust corpus consists of all the debtors' 11 U.S.C. Section 541(a) defined assets (including the stock of all the wholly-owned subsidiaries), and the Washington proceeds. Soon after the liquidating trustee took control of the trust, he sold the Miami Center to the bank's nominee and the proceeds became a part of the trust corpus.

The government was listed as a creditor. It was involved in other tax disputes with the debtors and had notice of the bankruptcy proceedings. The government received copies of the competing plans and disclosure statements; had an opportunity to object and be heard on the terms proposed in the plans; and to appeal from the order of confirmation which contained no provision for payment of capital gain taxes. The government did none of these things.

As conceded by the government and the debtors, the trust is not a separate taxable entity. However, the government and the debtors argue that the trust is responsible for filing an income tax return on behalf of the debtors and to pay the tax due, pursuant to 26 U.S.C. §§ 6012(b)(3), (b)(4), and 6151. The govern-

ment supports this position by arguing that the liquidating trustee is a "trustee in a case under title 11 of the United States Code, or assignee . . . ," under 26 U.S.C. § 6012(b)(3), thereby subjecting the trust to liability for taxes. The government also argues that the trust is responsible for taxes under 26 U.S.C. § 6012(b)(4) because it is "a trust, or an estate of an individual under Chapter 7 or title 11 of the United States Code [and payment] shall be made by the fiduciary thereof." 26 U.S.C. § 6012(b)(4) (bracketed material added). Both the government and the debtors principally rely upon *In the Matter of I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974) to support their argument that the trust is responsible for these taxes.

The liquidating trustee argues that 26 U.S.C. § 6012 (b)(3), (b)(4) and *I.J. Knight*, 501 F.2d 62 are not applicable because the liquidating trustee in the case *sub judice* is not a trustee in a case under title 11 of the United States Code. The liquidating trustee also argues that 26 U.S.C. §§ 6012(b)(3) and (b)(4) are not applicable because the trust is a grantor trust, as defined under Subpart E of Subchapter J of the Internal Revenue Code, 26 U.S.C. §§ 671-79 and as such the trust is not a taxable entity under the Internal Revenue Code. The liquidating trustee cites *In re Sonner*, 53 B.R. 859 (Bankr. E.D. Va. 1985), as support for his position that the trust is a grantor trust and therefore not responsible for filing tax returns or paying federal income taxes due, if any, on the sale of either the Miami Center or the Washington properties.

The *I.J. Knight* court found that a non-operating trustee appointed under Title 11 of the Bankruptcy Code was "liable for payment of federal taxes on income generated during liquidation and distribution of the bankrupt estate" pursuant to 26 U.S.C. § 6012(b)(3). *I.J. Knight*, 501 F.2d at 62. The reliance on *I.J. Knight* by the debtors and the government is misplaced for the

Court finds that the liquidating trustee is not a trustee appointed in a case under title 11. The liquidating trustee was appointed by the court as part of a confirmed plan of reorganization and his actions are limited to the powers granted to him in the plan and the order of confirmation. The plan created the trust solely to pay the debtors' indebtedness in a manner specified by the plan. Once that function is served, the liquidating trustee and the trust will cease to exist. Therefore the Court finds that the liquidating trustee, being a creature of a contract, is a contract trustee.

It is well-settled that tax statutes are "not to be extended by implication beyond the clear import of the language used and, in case of doubt, are construed most strongly against the government." *Greyhound Corporation* v. *United States*, 495 F.2d 863 (9th Cir. 1974). The obvious reasoning for this rule of construction is that the power to tax is the power to destroy, and "Congress could very easily have manifested any other intent by a limiting or qualifying provision." *Frankel* v. *United States*, 192 F. Supp. 776 (D. Minn. 1961), *affirmed*, 302 F.2d 666 (8th Cir. 1962), *cert. denied*, 371 U.S. 903, 83 S. Ct. 208, 9 L.Ed.2d 165 (1962). Therefore the Court finds that the liquidating trustee is not liable for payment of federal taxes, if any are due, under 26 U.S.C. § 6012(b)(3) since by its language it applies only to a trustee in a case under title 11.

Furthermore, the Court finds that the liquidating trustee is not an assignee within the meaning of 26 U.S.C. § 6012(b)(3) or a fiduciary under 26 U.S.C. § 6012(b)(4). The liquidating trustee's duties and powers under the plan are limited. The liquidating trustee does not possess discretionary authority as to the disposition of plan's assets. The liquidating trustee is merely charged with the responsibility of identifying, quantifying and paying allowed claims through the disbursement of the trust assets in accordance with the terms of the confirmed

plan. The liquidating trustee's functions are more closely analogous to those of a disbursing agent than to an assignee or a fiduciary and, as such, he is not subject to tax liability as provided in 26 U.S.C. §§ 6012(b)(3) or (b)(4). *See In re Alan Wood Steel Co.*, 7 B.R. 697 (Bankr. E.D. Pa. 1980).

Additionally, there was no assignment of the debtors' properties except as provided in the plan. The plan does not provide for the trust to file tax returns reflecting the sale of the properties in question or for the trust to pay taxes on those sales. If Congress had intended to hold a disbursing agent or contract trustee liable to file a tax return and to pay taxes, it could have explicitly provided for this in 26 U.S.C. §§ 6012(b)(3) and (b)(4) or elsewhere in the Internal Revenue Code. *Alan Wood Steel*, 7 B.R. at 700. This court lacks authority to extend 26 U.S.C. §§ 6012(b)(3) or (b)(4) beyond the clear import of their language. *See Greyhound Corp.*, 495 F.2d 863 and *Alan Wood Steel*, 7 B.R. 697.

The liquidating trustee and the trust are also not liable for any taxes that may be due and owing to the government because the trust is a grantor trust and, as such, it is not a taxable trust under the Internal Revenue Code. *See* Subpart E of Subchapter J, 26 U.S.C. §§ 671-79 and *Sonner*, 53 B.R. 859. Under 26 U.S.C. §§ 671-79, a grantor who has retained specified powers exercisable without the approval or consent of an adverse party is considered the owner of the trust and is taxed individually. *United States* v. *Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983), *aff'd*, 761 F.2d 1056, 1060-61 (5th Cir. 1985). The retention of power is manifested by the grantor's or non-adverse party's ability to control the beneficial enjoyment of the corpus or the income therefrom, or to receive income from the trust. 26 U.S.C. §§ 675 and 677. An adverse party is defined as a party which has a substantial beneficial interest in the trust which would be adversely affected by the exercise or non-

exercise of its powers regarding the trust. 26 U.S.C. § 672(a). The liquidating trustee in not an adverse party under the Internal Revenue Code. 26 U.S.C. Section 672(a). *See also Buttorff*, 563 F. Supp. 450 and Treas. Reg. §§ 1.672(a)-1(a), (a)-1(b).

Pursuant to 26 U.S.C. § 677(a), the grantor of a trust is treated as the owner if the income of the trust is "or, in the discretion of the grantor or a non-adverse party, or both, may be" applied to discharge a legal obligation of the grantor. *Sonner*, 53 B.R. at 863; 26 U.S.C. § 677(a); Treas. Reg. § 1.677(a)-1(d). Here, the debtors are the grantors of the trust, pursuant to the confirmed plan. The debtors' property became the property of the bankruptcy estate upon the filing of the Chapter 11 petitions and that estate was transferred to the trust pursuant to the terms of the plan. The entirety of the trust —its corpus and any income earned therefrom—is required under the plan to be used to discharge the legal obligations of the debtors. Any remainder is required to be paid back to the discharged debtors.

Treas. Reg. § 1.677(a)-1(d) unequivocally states that a trust whose income is used to discharge a grantor's legal obligations is a grantor trust. Additionally, Treas. Reg. § 1.677(a)-1(d) specifies that if the grantor, or a non-adverse party may, in their discretion, use trust income to satisfy the grantor's legal obligations, the trust is a grantor trust. *See* Treas. Reg. § 1.677(a)-1(d) and 26 U.S.C. § 677(a).

For the trust to be considered a taxable entity, the trustee must have as one of his permitted powers discretion as to which of the grantor's legal obligations to satisfy. The liquidating trustee in this case has no such discretion. Under the plan and 11 U.S.C. § 1142(a) neither the liquidating trustee or the grantors/debtors possess the discretionary power to decide how to disburse the assets of the trust to satisfy the grantors/debtors'

legal obligations. The confirmed plan delineates the exclusive method of disbursement to the creditors.

The *Sonner* case directly supports this analysis. In *Sonner*, the debtor's voluntary Chapter 11 proceeding resulted in a confirmed plan of reorganization which required the debtor to convey his interest in certain parcels of real estate to a creditors' trust. The creditors' trust provided for the liquidation of the real estate at specified prices for the benefit of the debtor's creditors, with any remainder to be conveyed back to the debtor. This is precisely what the confirmed plan in the instant case provided. Specifically, the creditors' trust in *Sonner* required the liquidating trustee to hold and distribute the proceeds from the sale of the debtor's real estate in accordance with the terms of the confirmed plan. Like the plan herein, the creditors' trust in *Sonner* did not provide for the payment of taxes. The issue in that case was "whether the creditors' trust is the entity responsible for the payment of tax resulting from the sale of the parcels of real estate." *Sonner*, 53 B.R. at 860. The *Sonner* court noted that the intent of the debtor and his creditors, as is the case herein, was to use the trust as a vehicle simply for the purpose of liquidating the properties to pay creditors, and to return any excess to the debtor.

The *Sonner* court held that the creditor's trust was not responsible for the payment of a capital gains tax resulting from the sale of property. 53 B.R. at 866. The court held that the creditors trust was a grantor trust, as defined in Subchapter J of the Internal Revenue Code, and the grantor-debtor, as owner of the trust, was liable for the taxes. *Sonner*, 53 B.R. at 866. The Court agrees with and therefore adopts the reasoning found in the *Sonner* case thereby finding that the liquidating trustee is not liable for payment of federal income taxes, if any, that were incurred by the sale of the Miami Center and the Washington properties since the trust is a grantor trust and a non-taxable entity under the Internal Revenue

Code. *Sonner*, 53 B.R. 859. *See also Stockton* v. *United States*, 335 F. Supp. 984, 986 (C.D. Ca. 1971) (where the purpose of the trust is to extinguish the grantor's indebtedness, the grantor is treated as the owner of the trust for income tax purposes and the trust is not considered a taxable entity).

For the Court to conclude otherwise would be inconsistent with the recent ruling by the Eleventh Circuit Court of Appeals in *Miami Center Limited Partnership* v. *Bank of New York*, 838 F.2d 1547 (11th Cir. 1988). The payment of the federal taxes would, of necessity, be an impermissible modification of the confirmed plan. *See* 11 U.S.C. 1127(b); *In re Northampton Corp.*, 59 B.R. 963, 968-69 (E.D. Pa. 1984); *In re Seminole Park & Fairgrounds, Inc.*, 502 F.2d 1011, 1014 (5th Cir. 1974); *See In re Hayball Trucking, Inc.*, 67 B.R. 681, 684 (Bankr. E.D. Mich. 1986); *See also Claybrook Drilling Co.* v. *Divanco, Inc.*, 336 F.2d 697, 701 (10th Cir. 1964); *In re At of Maine, Inc.*, 56 B.R. 55, 57 (Bankr. D. Me. 1985); *In re Heatron*, 34 B.R. 526 (Bankr. W.D. Mo. 1983).

As noted by the court in *Miami Center Limited Partnership* when dismissing the appeal, it is legally and practically impossible to unwind the confirmation of this plan or to otherwise restore the status quo. The Court will not allow a "piecemeal dismantling" of a reorganization plan. *See In re AOV Industries, Inc.*, 792 F.2d 1140 (D.C. Cir. 1986). The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan, more than two and one-half years after its confirmation. A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. Additionally, the creditors voted on the plan and received payments under the terms of the plan based upon good faith reliance induced, in part, by the inaction of the government. It is simply impracticable,

and may well nigh be impossible, to unwind the substantially consummated and confirmed plan.

In summary, the Court finds that the liquidating trustee is not responsible to file income tax returns or to pay income taxes, if any are due and owing, resulting from the sale of the Miami Center or the Washington properties.

A Separate Final Judgment of even date has been entered in conformity herewith.

DATED at Miami, Florida, this 28 day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

## APPENDIX D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

---

Case Nos. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. No. 87-0627-BKC-SMW-A

---

IN RE: HOLYWELL CORPORATION, *et al.*, DEBTORS.

---

FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST,
*Plaintiff*,

*v.*

THE UNITED STATES OF AMERICA, *et al.*,
*Defendants.*

---

Chapter 11 Proceedings

---

[Filed April 28, 1988]

---

FINAL JUDGMENT

---

In conformity with the Findings of Fact and Conclusions of Law of even date, it is hereby

ORDERED AND ADJUDGED that the liquidating trustee of the Miami Center Liquidating Trust is not responsible for filing federal income tax returns on behalf of the debtors or liable to the United States of America for federal income taxes, if any, due on gain realized from the sale of real estate in Washington or from the sale of the Miami Center in Miami, Florida.

DONE AND ORDERED at Miami, Florida, this 28 day of April, 1988.

/s/ Sidney M. Weaver
SIDNEY M. WEAVER
U.S. Bankruptcy Judge

## APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 89-5862

---

IN RE HOLYWELL CORPORATION, *et al.*, DEBTORS.

---

FRED STANTON SMITH, AS TRUSTEE OF THE
MIAMI CENTER LIQUIDATING TRUST,
*Plaintiff-Appellee,*

*v.*

THE UNITED STATES OF AMERICA, *et al.*,
*Defendants-Appellants,*

SHUTTS & BOWEN,
*Intervenor,*

BANK OF NEW YORK,
*Defendant-Appellee.*

---

On Appeal from the United States District Court
for the Southern District of Florida

---

[Filed December 21, 1990]

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: HATCHETT and COX, *Circuit Judges*, AND HENDERSON, *Senior Circuit Judge*

---

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

## APPENDIX F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

---

Case Nos. 84-01590-BKC-TCB
84-01591-BKC-TCB
84-01592-BKC-TCB
84-01593-BKC-TCB
84-01594-BKC-TCB

---

IN RE: HOLYWELL CORPORATION, *et al.*, DEBTORS.

---

Chapter 11 Proceedings

---

[Filed March 26, 1985]

[Confirmed August 8, 1985]

---

# AMENDED CONSOLIDATED PLAN OF REORGANIZATION PROPOSED BY THE BANK OF NEW YORK

---

The Bank of New York submits the following Plan of Reorganization:

* * * *

## IV. *MEANS FOR EXECUTION OF THE PLAN*

*Sale of Miami Center*

The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the "Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days afer the Effective Date.

* * * *

## V. *CREATION OF TRUST*

1. A Trust is hereby declared and established on behalf of the Debtors effective on the Effective Date and an individual to be appointed by the Court (and if requested, after nominations by any party-in-interest) is designated as Trustee of all property of the estates of the Debtors within the meaning of § 541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan. The Trust shall be known as the "Miami Center Liquidating Trust".

2. On the Effective Date, all right, title and interest of the Debtors in and to the Trust Property, including Miami Center, shall vest in the Trustee, without further act or deed by the Debtors or any other of them, and without the filing or recording of any instrument of conveyance, assignment or transfer, *subject however*, to all existing liens, mortgages, security interests and encumbrances.

3. Subject to the provisions of this Plan and in order to insure the prompt implementation of the Plan, the Trustee shall have full power and authority to:

(a) Enter into the Contract of Sale and to perform all acts that are necessary or appropriate to effect the sale of Miami Center to BNY or its designee in accordance with the Contract of Sale;

(b) Perfect and secure his right, title and interest to the Trust Property;

(c) Reduce all of the Trust Property to his possession and hold the same;

(d) Sell and convert the Trust Property to cash and distribute the proceeds as specified herein;

(e) Manage, operate, improve, and protect the Trust Property as specified herein;

(f) Lease or renew leases;

(g) Grant options to purchase and to contract to sell and sell the property owned by the Trust or any part or parts thereof for such purchase price and for cash or on such terms as may be appropriate;

(h) Mortgage, pledge or otherwise encumber the Trust Property or any part or parts thereof;

(i) Exchange and re-exchange the Trust Property or any part or parts thereof for other real or personal property;

(j) Release, convey or assign any right, title or interest in or about the Trust Property;

(k) Pay and discharge any mortgage or other lien or encumbrance against the Trust Property and pay and discharge any other costs, expenses or obligations deemed necessary to preserve the Trust Property or any part thereof or to preserve the Trust;

(l) Improve or repair the Trust Property or any part thereof;

(m) Purchase insurance of all kinds sufficient to protect fully the Trust Property and to protect from lia-

bility the Trustee, the Creditors Committees and the employee of any member of the Creditors Committees;

(n) Deposit trust funds and draw checks and make disbursements thereof;

(o) Employ attorneys, accountants, engineers, agents, realtors, rental agents, tax specialists and clerical and stenographic assistants as may be deemed necessary, at such compensation as the Trustee may deem reasonable;

(p) Take any action required or permitted by this Plan;

(q) Sue and be sued;

(r) Appoint, remove and act through agents, managers and employees and confer upon them such power and authority as may be necessary or advisable;

(s) Invest funds of the Trust in demand and time deposits in any national bank which is an authorized depository for bankruptcy funds in the federal district in which the Trustee resides or to make temporary investments such as short-term certificates of deposit in such bank or treasury bills;

(t) Prosecute and defend all actions affecting the Trust Property;

(u) Settle, compromise, release, discontinue, or adjust by arbitration or otherwise any disputes, litigations, or controversies in favor of or against the Trust Property or the Debtors or any of them, including but not limited to the discontinuances required by the Contract of Sale;

(v) Waive or release rights of any kind relating to the Trust Property or the Debtors or any of them, including but not limited to the releases required by the Contract of Sale;

(w) Deal with the Trust Property or any part or parts thereof in all other ways as would be lawful for any per-

son owning the same to deal therewith, whether similar to or different from the ways above specified, at any time or times hereafter;

(x) Take no action that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions.

* * * *

## XIV. *RETENTION OF JURISDICTION*

The Court shall retain jurisdiction after confirmation until all payments and distributions called for under the Plan had been made and until the entry of final decree, in respect to the following matters:

(a) to hear and determine all claims, including claims arising from the rejection of any executory contract and any objections which may be made thereto;

(b) to liquidate, or estimate damages or to determine the manner and time for such liquidation or estimation in connection with any contingent or unliquidated claims;

(c) to adjudicate all claims or controversies arising during the pendency of the Chapter 11 cases;

(d) to allow or disallow any claim; and

(e) to make any orders which may be necessary or appropriate to carry out the provisions of this Plan, including any orders relating to the reservation of equitable rights set forth in Article XIII hereof.

Dated: February 26, 1985, as amended as of March 22, 1985.

THE BANK OF NEW YORK

* * * *